Supreme Court, U. S.
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No. 73-1380

# In the Supreme Court of the United States

OCTOBER TERM, 1973

CHEMEHUEVI TRIBE OF INDIANS, ET AL., PETITIONERS

*v.*

FEDERAL POWER COMMISSION, ET AL.

*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE FEDERAL POWER COMMISSION

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Petitioners filed a complaint with the Federal Power Commission alleging that the Commission has licensing jurisdiction under Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797(e), over the construction of six thermal-electric generating plants that would draw cooling water from the Colorado River System. They alleged that the Commission has jurisdiction both because the plants are "project works" for the development and transmission of power across and along navigable waters and because they will use "surplus water" from government dams, within the meaning of those phrases as used in Section 4(e). The Commission dismissed the complaint on the ground that it has no jurisdiction to license thermal-electric plants (Pet. App. 1a-3a).

The court of appeals held that thermal-electric plants are not "project works" under Section 4(e) and that the Commission therefore has no licensing jurisdiction over the plants under that clause (*id.* at 22a-66a). The "history of the Act" (*id.* at 41a) and the "consistent administrative construction" (*id.* at 45a) show "beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power" (*id.* at 41a). The court also held, however, that the Commission's licensing authority under the "surplus water" clause of Section 4(e) is *not* limited to plants using such water to generate hydroelectric power but includes steam plants using the water for cooling purposes (*id.* at 66a-81a).

On May 6, 1974, we filed on behalf of the Commission a petition for a writ of certiorari (No. 73-1667) to review the judgment of the court of appeals with respect to the "surplus water" issue. We argued in that petition that the decision is contrary to 54 years of consistent administrative construction of the Federal Power Act, that it conflicts with the clear implications of this Court's decision in *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, and that the issue has immediate and substantial public importance. The petition in the present case seeks review of the remaining portion of the court of appeals' ruling (that thermal-electric plants are not "project works"), but only in the event that the Commission's petition in No. 73-1667 is granted.



In our view, the decision below is correct with respect to the "project works" clause. We recognize, however, that the "project works" and "surplus water" issues are in many respects identical. The Commission has consistently viewed both clauses as applying only to plants that use water to generate hydroelectric power.

We therefore suggest that it would be appropriate for the Court to grant the petition in this case if it grants the Commission's petition in No. 73-1667. In that way, it could resolve all the important questions concerning the Commission's licensing jurisdiction over thermal-electric generating plants.

Respectfully submitted.

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see 73-1666,
1667